(1) Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

MARTIN A. POLITZER, *Petitioner*,

v.

SALOMON SMITH BARNEY INC., *Respondent*

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The United States Court of Appeals for the Ninth Circuit held that claims brought under California consumer protection laws and common law claims, concerning representations as to the quality and nature of a financial institution's services, fall within the scope of the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), Pub. L. No. 105-353, 112 Stat. 3227 (codified in part, 15 U.S.C. § 77bb(f)). Accordingly, the Court of Appeals found that SLUSA completely preempts claims brought under state consumer protection laws and state common law. That decision raises substantial federal questions, warranting immediate review by this Court:

1. Whether the Ninth Circuit's decision that SLUSA extends to state law actions which do not involve the purchase or sale of a publicly traded security, a decision which conflicts with the decisions of the Second and Eighth Circuit Courts of Appeals, impermissibly expands the scope of federal law in a manner inconsistent with the federal system established by the U.S. Constitution.

2. Whether construing SLUSA's "in connection with" jurisdictional prerequisite to include cases that do not involve a purchase or sale of a security improperly forecloses remedies available under California law, as articulated by the California Supreme Court.

PARTIES TO THE PROCEEDING

The following individuals and entities are parties to the proceeding in the court below:

Martin A. Politzer; *Plaintiff-Appellant* (on behalf of a putative class of Salomon Smith Barney customers);

Salomon Smith Barney, Inc.; *Defendant-Apellee*

CORPORATE DISCLOSURE STATEMENT

Defendant-Appellee Salomon Smith Barney Inc. (n/k/a Citigroup Global Markets, Inc.) is a wholly-owned subsidiary of Citigroup Financial Products Inc. (f/k/a Salomon Brothers Holding Company Inc.), which is a wholly owned subsidiary of Citigroup Global Markets Holdings Inc. (f/k/a Salomon Smith Barney Holdings Inc.) which is a wholly owned subsidiary of Citigroup Inc. Citigroup Inc. is a publicly traded corporation that has no parent corporation. No publicly traded corporation owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Martin A. Politzer respectfully prays for the issuance of a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at *Politzer v. Salomon Smith Barney, Inc.*, 113 Fed. Appx. 845, No. 03-56414, 2004 WL 2677680 (9th Cir. Nov. 24, 2004), and is reprinted at Pet. App. 1a-3a. The opinion of the district court is unreported, and is reprinted at Pet. App. 4a-17a.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on November 24, 2004. (Pet. App. 1a.) This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article VI, Clause 2 of the Constitution of the United States provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2.

The Tenth Amendment to the Constitution of the United States provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

The Securities Litigation Uniform Standards Act of 1998 ("SLUSA") provides, in pertinent part:

> No covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging—

> (A) a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security; or
>
> (B) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security.

15 U.S.C. § 77bb(f)(1).

The California Consumers Legal Remedies Act, CAL. CIV. CODE § 1750 et seq. (West 1998), provides, in pertinent part:

> (a) The following unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or which results in the sale or lease of goods or services to any consumer are unlawful:
>
> . . .
>
> (5) Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do no have . . . .
>
> (7) Representing that goods or services are of a particular standard, quality, or grade, or that

> goods are of a particular style or model, if they are of another.

CAL. CIV. CODE § 1770.

The California Unfair Competition Law, CAL. BUS. & PROF. CODE § 17200 et seq. (West 1997), provided, during times relevant to the proceedings before the District Court and Court of Appeals, in pertinent part:

> As used in this chapter, unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising . . . .

CAL. BUS. & PROF. CODE § 17200.

> Actions for relief pursuant to this chapter shall be prosecuted exclusively in a court of competent jurisdiction . . . by any person acting for the interests of itself, its members or the general public.

CAL. BUS. & PROF. CODE § 17204.

> It is unlawful for any person, firm, corporation or association, or any employee thereof with intent directly or indirectly . . . to perform services, professional or otherwise, or anything of any

nature whatsoever or to induce the public to enter, into any obligation relating thereto, to make or disseminate or cause to be made or disseminated before the public in this state, or to make or disseminate or cause to be made or disseminated from this state before the public in any state, in any newspaper or other publication, or any advertising device, or by public outcry or proclamation, or in any other manner or means whatever, including over the Internet, any statement, concerning that real or personal property or those services, professional or otherwise, or concerning any circumstance or matter of fact connected with the proposed performance or disposition thereof, which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading, or for any such person, firm, or corporation to so make or disseminate or cause to be so made or disseminated any such statement as part of a plan or scheme with the intent not to sell that personal property or those services, profession or otherwise, so advertised at the price stated therein, or as so advertised.

CAL. BUS. & PROF. CODE § 17500 (West 1997).

STATEMENT OF THE CASE

I. Nature Of Petitioner's Claims

Petitioner Martin A. Politzer, the Plaintiff-Appellant in the proceedings below, is a California resident seeking to invoke his remedies under California law. Petitioner originally brought claims for (1) violation of the California Consumers Legal Remedies Act; (2) violation of California Business and Professions Code section 17200 (referred to herein as the "Unfair Competition Law"); and (3) constructive fraud. Subsequently, Petitioner amended his complaint to include a claim for violation of California Business and Professions Code section 17500 (referred to herein as the "False Advertising Law").

Petitioner brought this action against Defendant-Appellee Salomon Smith Barney Inc., n/k/a Citigroup Global Markets, Inc. ("SSB"), alleging that SSB had misrepresented the nature of its research and stock rating system as objective, independent, trustworthy, and free of conflicts, when SSB's system of investment advice was actually biased, tainted, and misleading. Petitioner brought these claims both individually and on behalf of a class of California residents who were clients of SSB, and who received the tainted reports. Petitioner did not specifically allege injury or claims arising from the purchase or sale of securities, for himself or for the purported class. Petitioner originally included a prayer

for damages based on fees and commissions paid to Defendant-Appellee, but subsequently amended to eliminate allegations relating to commissions.

II. Procedural History

A. Trial Court Proceedings

Petitioner originally filed his action in California state court on January 29, 2003. Shortly thereafter, Defendant-Appellee removed the action to the United States District Court for the Central District of California, pursuant to 28 U.S.C. § 1446. Jurisdiction was premised on 15 U.S.C. §§ 78bb(f)(2) and 78p(c), and 28 U.S.C. § 1331 and 1441.

Petitioner filed a motion to remand the action to the California Superior Court. Defendant-Appellee simultaneously opposed the motion to remand and filed a cross-motion to dismiss the action. The core issue of the motions was whether SLUSA preempts Petitioner's state law claims arising from SSB's allegedly biased research reports.

The district court found that Petitioner's claims satisfied the jurisdictional prerequisites of SLUSA, and that SLUSA preempts the claims. Since the action was premised entirely on state law claims, the district court dismissed the action, with leave to amend but only to

state claims under federal securities law. The parties then stipulated to a dismissal of the action with prejudice to perfect the right of appeal. Petitioner timely noticed his appeal.

B. Appellate Proceedings

On review, the United States Court of Appeals for the Ninth Circuit affirmed the judgment, holding that, consistent with Ninth Circuit precedent, the district court properly determined it had removal jurisdiction, and that "[t]he district court was also correct in dismissing the appellant's claims as preempted because SLUSA provides for the removal and dismissal of class actions brought pursuant to state law alleging misrepresentations in connection with the purchase or sale of a covered security." (Pet. App. 2a.)

REASONS FOR GRANTING THE PETITION

The federal question presented in this case – the preemptive scope of SLUSA – impacts the remedies that are available to individuals under the laws of their home states. These remedies include not only common law claims (an inherent matter of state law), but also statutory consumer protection laws, which states enact for the protection and welfare of their citizens. Such consumer protection measures are exercises of the states' traditional police powers. The Ninth Circuit's application of SLUSA effectively supplants powers

reserved to the states. The displacement of states' rights in favor of federal law, suggests a singular standard under a unified federal scheme. However, conflicting decisions from the Courts of Appeals demonstrate that the diversity of state standards acceptable under a federal system of government has been exchanged for a conflicted federal system, in which the Circuit Courts of Appeals have reached conflicting conclusions on the scope of SLUSA preemption. The interplay between federal law and state consumer remedies implicates a question involving the fundamental structure of the nation's government – the federalist system and the supremacy of federal law in those circumscribed spheres where Congress expressly provides for preemption, and the reservation of all other rights to the states. *See* U.S. CONST. art. VI, cl. 2; U.S. CONST. amend. X. The power of California, and its sister states, to establish protections for their citizens is abrogated under the Ninth Circuit's decision. Because of the importance of this federal question, review should be granted to clarify whether that determination is valid, and if so to provide definitive guidance as to the proper boundaries of the federal scheme when federal securities law and state consumer protection law touch upon the same subject matter – the misconduct of investment firms that does not directly relate to the purchase and sale of securities.

I. The Ninth Circuit's Resolution Of The Important Federal Question Presented In This Case Conflicts With Decisions Of Other United States Courts Of Appeals

A. The Ninth Circuit's Decision Brings Transactions Not Involving The Purchase Or Sale Of Securities Within The Scope Of SLUSA

Petitioner's action arises from alleged misrepresentations that the Defendant-Appellee made through its research reports, which are alleged to have been biased and tainted by Defendant-Appellee's self-interest in seeking investment banking business. He did not allege the purchase or sale of securities. Despite these facts, the Ninth Circuit found that SLUSA preempts Petitioner's claims "because SLUSA provides for the removal and dismissal of class actions brought pursuant to state law alleging misrepresentations in connection with the purchase or sale of a covered security." (Pet. App. 2a.) The Court of Appeals did not provide detailed reasoning in its memorandum opinion, but stated its reliance on its prior decisions, *Falkowski v. Imation Corp.*, 309 F.3d 1123, 1128-29, 1131 (9th Cir. 2002), *Patenaude v. Equitable Life Assurance Soc'y of the U.S.*, 290 F.3d 1020, 1023-24 (9th Cir. 2002), and *Feitelberg v. Merrill Lynch & Co.*, 353 F.3d 765 (9th Cir. 2003). (Pet. App. 2a-3a.)

B. The Ninth Circuit's Decision Conflicts With A Decision Of The Second Circuit

The Ninth Circuit's view of SLUSA's scope, and the extent to which it supplants remedies available under state law, directly conflicts with the Second Circuit's recent decision in *Dabit v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 395 F.3d 25 (2d Cir. 2005). The issue before the Second Circuit, which was one of first impression, was the same important federal question that was presented in this case: whether SLUSA "preempts claims that do not allege that putative class members purchased or sold particular securities in reliance upon the defendant's alleged misconduct." *Dabit*, 395 F.3d at 27. *Dabit* was a consolidated appeal of two actions. "Both actions alleged that defendants-appellees Merrill Lynch & Co., Inc. and Merrill Lynch Pierce Fenner Smith, Inc. (collectively, 'Merrill Lynch') issued biased research and investment recommendations designed to garner investment banking business and sought relief under state law." *Id.* at 28. The *Dabit* court noted the history of the proceedings in the trial court:

> The district court found the state law claims to be "based on the very same alleged series of transactions and occurrences asserted in the federal securities actions currently being coordinated before this Court," and [holding] that the claims "fall squarely within SLUSA's ambit" because they allege "misrepresentations or

> omissions of material facts or [a] manipulative or deceptive device or contrivance in connection with the purchase or sale of a nationally traded security."

Id.

In *Dabit*, as in this case, "the principal question . . . is whether these purported misrepresentations and omissions were alleged to be 'in connection with the purchase or sale' of the covered securities for the purposes of SLUSA." *Id.* at 34.

In resolving the question of whether the plaintiffs' state law claims satisfied SLUSA's "in connection with" requirement, the *Dabit* court followed the practice of the other federal courts of appeals by turning to judicial interpretation of that phrase in the context of § 10(b) of the Securities and Exchange Act of 1934, Pub. L. No. 73-291, 48 Stat. 881, 891 (1934) (codified at 15 U.S.C. § 78j(b)), and Rule 10b-5, 17 C.F.R. § 240.10b-5. Adopting that line of judicial interpretation, the *Dabit* court went on to note that the "in connection with" language, although broad, was not unlimited, citing this Court's "most recent elaboration of the 'in connection with' requirement, [which] cautions that the phrase must not 'be construed so broadly as to convert every common-law fraud that happens to involve securities into a violation of § 10(b).'" *Id.* at 37 (citing *SEC v. Zandford*, 535 U.S. 813, 820, 122 S. Ct. 1899, 153 L.

Ed. 2d 1 (2002)). Cognizant of this Court's guidance in *Zandford*, the Second Circuit applied the standing rule of *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 95 S. Ct. 1917, 44 L. Ed. 2d 539 (1975), under which 10b-5's remedies are available only to actual purchasers and sellers of securities. *Dabit*, 395 F.3d at 38 (citing *Blue Chip Stamps*, 421 U.S. at 733). The *Dabit* court accordingly held that "it is far more natural to suppose that Congress meant to import the settled standing rule along with the 'in connection with' phrase as a substantive standard." *Dabit*, 395 F.3d at 40. Therefore, the Second Circuit determined that "in enacting SLUSA Congress sought only to ensure that class actions brought by plaintiffs who satisfy the *Blue Chip* purchaser-seller rule are subject to the federal securities laws." *Id.* at 43.

The Second Circuit next declined to interpret SLUSA as having preemptive effect whenever "a single complaint contains claims that include allegations triggering preemption and other claims that do not," noting "that the historic police powers of the states are not preempted unless it was Congress's 'clear and manifest purpose' to do so." *Id.* at 47 (citing *City of Milwaukee v. Illinois*, 451 U.S. 304, 316, 101 S. Ct. 1784, 68 L. Ed. 2d 114 (1981)).

Under this analytical framework, the Second Circuit identified various types of claims that will not be

preempted by SLUSA. First, the court carved out "holder" claims:

> A claim that a plaintiff purchased stock independent of any misrepresentation but was induced to retain it by a material misrepresentation or omission does not satisfy the *Blue Chip* standing requirement integral to the "in connection with" requirement of Rule 10b-5. . . . Our determination that the *Blue Chip* rule operates as a limit on the preemptive scope of SLUSA similarly commits us to the view that such holding claims are not preempted.

Id., 395 F.3d at 44.

Next, the *Dabit* court excluded claims brought on behalf of a putative class asserting claims for payment of annual fees, based on theories of breach of contract and state consumer protection law. *Id.* at 47-48. Under the Second Circuit's reasoning, Petitioner's common law claim for constructive fraud, and his statutory claims under California's Consumers Legal Remedies Act, Unfair Competition Law, and False Advertising Law, would not be preempted by SLUSA.

C. The Ninth Circuit's Decision Conflicts With A Decision Of The Eighth Circuit

The Eighth Circuit, like the Second Circuit has defined SLUSA's "in connection with" requirement in a manner that is also at odds with the Ninth Circuit's decision. In *Green v. Ameritrade, Inc.*, 279 F.3d 590, 598-99 (8th Cir. 2002), the court held that the "in connection with" phrase, under SLUSA and under § 10(b) and Rule 10b-5, where no sale or purchase was alleged. Applying that interpretation of SLUSA's "in connection with" language, the court held: "We believe that, in enacting SLUSA, Congress did not make class actions on behalf of 'nonsellers' and 'nonpurchasers' removable to federal court." *Green*, 279 F.3d at 598.

Further, the *Green* court held that the plaintiff's state law claim, which had been amended to avoid SLUSA, did not satisfy the "in connection with" requirement. It made no difference whether the claim was articulated as a breach of contract claim or a misrepresentation claim:

> Even if [plaintiff] has artfully pleaded his amended complaint to cloak a misrepresentation claim in the garb of a breach-of-contract claim, no SLUSA preemption applies because his complaint does not satisfy the SLUSA "in connection with" requirement. Misrepresentation claims come in many forms that do not necessarily involve any purchase or sale of a

> security. [Plaintiff] may even plead such a claim and escape SLUSA preemption, so long as his state-law claim does not require him to prove there was a sale or purchase of a covered security in reliance on the misrepresentation.

Id. at 599 (citing *Abada v. Charles Schwab & Co.*, 127 F. Supp. 2d 1101, 1103 (S.D. Cal. 2000)).

II. The Ninth Circuit's Resolution Of The Important Federal Question Presented In This Case Conflicts With A Decision Of The California Supreme Court

Further, the Ninth Circuit's resolution of this case is in conflict with a decision of the California Supreme Court. In *Small v. Fritz Companies, Inc.*, 30 Cal.4th 167, 171 (2003), California's high court reviewed a putative class action, and had before it "the issue whether California should recognize a cause of action by persons wrongfully induced to *hold* stock instead of selling it." The *Small* court answered in the affirmative, holding that a "holder's action" based on fraud or negligent misrepresentation was permissible:

> California has long acknowledged that if the effect of a misrepresentation is to induce forbearance—to induce persons not to take action—and those persons are damaged as a result, they have a cause of action for fraud or

> negligent misrepresentation. We are not persuaded to create an exception to this rule when the forbearance is to refrain from selling stock. This conclusion does not expand the tort of common law fraud, but simply applies long-established legal principles to the factual setting of misrepresentations that induce stockholders to hold on to their stock.

Id.

In *Small*, the California high court considered challenges to the state action based on federal law. Specifically, the defendants relied on the Private Securities Litigation Reform Act of 1995 ("PSLRA"), Pub. L. No. 104-67, 109 Stat. 737, and SLUSA. The *Small* court rejected these challenges to the state court holder's action:

> [T]he PSLRA and [SLUSA] . . . do not affect state court holder's actions; the PSLRA governs only actions in federal court, and [SLUSA] by its terms applies only to suits involving the purchase or sale of stock. As defendants note, both acts demonstrate that Congress in 1995 and 1998 viewed stockholder class actions with considerable suspicion. Yet Congress did not abolish stockholder class actions under Rule 10b-5: by requiring specific pleading, it attempted to

> bar abusive suits while permitting meritorious suits.

Id. at 178.

The California Supreme Court was motivated by "strong countervailing policy arguments in favor of allowing a holder's cause of action." *Id.* at 182. These policy considerations include California's "'legitimate and compelling interest in preserving a business climate free of fraud and deceptive practices.'" *Id.* (citing *Diamond Multimedia Systems, Inc. v. Superior Court*, 19 Cal.4th 1036, 1064 (1999)).

In this case, Petitioner does not allege claims relating to the purchase or sale of securities. Although *Small* involved "holder" claims, premised on the plaintiff's (and the purported class's) holding of their stocks as a result of reliance on defendants' misrepresentations, the court's decision is applicable to Petitioner's claims. The plaintiff in *Small* alleged damages arising from defendants' misrepresentations in a company report, in which the company's profits and earnings were allegedly overstated. *Id.* at 173. The plaintiff alleged that the misrepresentations caused him and other shareholders to hold their stock through a period during which the share price fell 55%. *Id.* The plaintiff alleged that had the defendants not made the inaccurate statements, shareholders would have sold their shares before the stock hit its low point. *Id.* Notwithstanding

this connection to the purchase or sale of a security, the California Supreme Court held that the holder claims were not "in connection with" the purchase or sale of a security, and hence not preempted by SLUSA. Petitioner, who himself was a "holder," while not asserting traditional "holder" claims, seeks damages that arose from the opening of his account with Defendant-Appellee and related expenses such as margin interest and fees. His claims are not premised on any transaction in securities or on a price at which he would have sold any particular security. Because Petitioner's claims are more remote from a purchase or sale of a security than "holder" claims, his claims would be permissible under *Small*. The Ninth Circuit's decision thus limits the scope of state remedies available, in conflict with the standard for such state law claims enunciated by California's Supreme Court.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARTIN A. POLITZER, etc., Plaintiff – Appellant, v. SALOMON SMITH BARNEY, INC., Defendant – Appellee.	No. 03-56414 D.C. No. CV 03-1187-JFW MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
John F. Walter, District Judge, Presiding

Submitted November 2, 2004**
Pasadena, California
[FILED NOV 24 2004 CATHY A. CATTERSON, CLERK U.S. COURT OF APPEALS]

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously finds this case suitable for decision without oral argument FED. R. APP. P. 34(a)(2).

Before: FERNANDEZ, SILVERMAN, and CALLAHAN, Circuit Judges.

The appellant brought this putative class action in state court on behalf of himself and other clients of the appellee, asserting claims based on California statute and common law to address alleged misrepresentations and omissions in connection with the purchase and sale of securities. The appellant specifically alleged damages from receiving biased and misleading advice on publicly-traded securities from the appellee. The appellee removed the case to district court because the alleged state-law claims were preempted by and subject to dismissal under the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), Pub. L. No. 105-353 (codified in part, 15 U.S.C. § 77p).

On appeal, the appellant challenges the district court's denial of his motion to remand and dismissal of his state-law claims. The district court properly determined that it had removal jurisdiction over the case. 28 U.S.C. § 1447(c). The district court was also correct in dismissing the appellant's claims as preempted because SLUSA provides for the removal and dismissal of class actions brought pursuant to state law alleging misrepresentations in connection with the purchase or sale of a covered security. 15 U.S.C. § 77p(b)-(c); *Falkowski v. Imation Corp.*, 309 F.3d 1123, 1128-29, 1131 (9th Cir. 2002); *Patenaude v. Equitable Life*

Assurance Soc'y of the U.S., 290 F.3d 1020, 1023-24 (9th Cir. 2002); *see also Feitelberg v. Merrill Lynch & Co.*, 353 F.3d 765 (9th Cir. 2003) (adopting the district court's opinion dismissing state-law claims as preempted by SLUSA).

The appellant also argues that he should be allowed to file an amended complaint to clarify his state-law claims. This request comes too late because it is raised for the first time in his reply brief on appeal. *See Martinez-Serrano v. INS*, 94 F.3d 1256, 1259-60 (9th Cir. 1996) (declining to consider arguments raised for the first time in appellant's reply brief); *see also Fox v. Citicorp Credit Servs., Inc.*, 15 F.3d 1507, 1514 n.6 (9th Cir. 1994) (acknowledging that "serious questions of fairness" arise when a party advances an issue for the first time in his reply).

Accordingly, the judgment of the district court is AFFIRMED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. CV 03-1187-JFW (SHx)

Date: June 16, 2003

[ENTERED ON ICMS Jun 17 2003]

Title: MARTIN A. POLITZER, etc. -v- SALOMON SMITH BARNEY, INC.

DOCKET ENTRY

PRESENT:

HONORABLE JOHN F. WALTER, UNITED STATES DISTRICT JUDGE

K. Leigh Ray	**None Present**
Courtroom Deputy	**Court Reporter**

ATTORNEYS PRESENT FOR PLAINTIFFS:	**ATTORNEYS PRESENT FOR DEFENDANTS:**
None	**None**

PROCEEDINGS (IN CHAMBERS):	ORDER DENYING PLAINTIFF'S MOTION TO REMAND [filed 5/19/03] AND GRANTING DEFENDANT'S MOTION TO DISMISS [filed 4/25/03.]

On April 25, 2003, Defendant Salomon Smith Barney ("Defendant") filed a Motion to Dismiss ("Motion to Dismiss"). On May 2, 2003, Plaintiff Martin Politzer ("Plaintiff") filed an Opposition to Defendant's Motion to Dismiss. On May 9, 2003, Defendant filed a Reply.

On May 19, 2003, Plaintiff filed a Motion to Remand for Lack of Federal Question Jurisdiction or Diversity Jurisdiction ("Motion to Remand"). Plaintiff attempted to file his Motion to Remand on April 21, 2003, however, Plaintiff's Motion to Remand was rejected by the Court and not filed at that time. Apparently, Defendant did not discover that Plaintiff's Motion to Remand was rejected, because Defendant filed an Opposition on April 25, 2003. On May 2, 2003, Plaintiff filed a Reply to Defendant's Opposition. On May 14, 2003, the Court ordered Plaintiff to refile his Motion to Remand on or before May 19, 2003. Plaintiff successfully refiled his Motion to Remand on May 19, 2003.

Pursuant to Rule 78 of the Federal Rules of Civil Procedure and Local Rule 7-15, on May 27, 2003, the Court found that these matters were appropriate for decision without oral argument. The hearings calendared for June 2, 2003 were vacated, the matters taken off calendar and deemed submitted.

After considering the moving, opposition and reply papers regarding Plaintiff's Motion to Remand and Defendant's Motion to Dismiss, the Court orders as follows:

A. MOTION TO REMAND

1. Procedural Posture and Statement of Facts.

On January 29, 2003, Plaintiff filed a "proposed class action complaint" in the Los Angeles Superior Court alleging claims for violation of the Consumer Legal Remedies Act (first cause of action), violation of Business and Professions Code section 17200 (second cause of action), and constructive fraud (third cause of action).

In his Complaint, Plaintiff alleges that Defendant extensively promotes to the public a proprietary stock rating system and recommended stock list (collectively "Research Products"), which Defendant claims are

based on its own thorough and independent research and analysis, and that Defendant uses its Research Products to make recommendations to its customers. Complaint ¶¶2, 16. Plaintiff further alleges that Defendant's Research Products are replete with misrepresentations and omissions regarding the true value of the researched stocks, because Defendant's research and analysis has been compromised by Defendant's practice of providing very positive stock ratings for certain companies, in exchange for those companies giving their investment banking business to Defendant. Complaint ¶¶17, 24, 25-26.

On February 20, 2003, Defendant filed a Notice of Removal in which it contended that removal was appropriate because Plaintiff's state law causes of action were preempted by the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"). In the Notice of Removal, Defendant contends that notwithstanding Plaintiff's allegations of only state law causes of action, Plaintiff's claims fall under the SLUSA which provides that:

> [n]o covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any state or Federal court by any private party alleging –
>
> (1) an untrue statement or omission of a material fact in connection with the purchase or sale of a covered security; or

(2) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security.

On April 16, 2003, prior to Defendant filing an Answer to Plaintiff's Complaint, Plaintiff filed a First Amended Complaint ("FAC") alleging claims for violation of the California Consumer Legal Remedies Act (first cause of action), violation of California Business and Professions Code section 17200 (second cause of action), violation of California Business and Professions Code section 17500 (third cause of action), and constructive fraud (fourth cause of action). Plaintiff's FAC is substantially the same as his Complaint, but for the addition of a cause of action for violation of California Business and Profession Code section 17500, and the deletion of certain language in an apparent effort to avoid SLUSA preemption.

2. Discussion

a. Plaintiff's Original Complaint is Considered For Purposes of Determining Removal Jurisdiction.

In determining the existence of removal jurisdiction, based upon a federal question, the court must look to the complaint *as of the time*

the removal petition was filed. Jurisdiction is based on the complaint as originally filed and not as amended.

Abada v. Charles Schwab & Co., Inc., 300 F.3d 1112, 1117 (9th Cir. 2002) (quoting O'Halloran v. Univ. of Wash., 856 F.2d 1375, 1379 (9th Cir. 1988) (emphasis in original).

As a result, Plaintiff's FAC is irrelevant in determining whether this action was properly removed. See Libhart v. Santa Monica Dairy Co., 592 F.2d 1062, 1065 (9th Cir. 1979) (holding that if the court does not have jurisdiction over the complaint when removed, the court does not have jurisdiction to consider a later amendment to the complaint).

b. Legal Standard for Remand.

The Court must remand a removed case "if at any time before final judgment it appears that the . . . court lacks subject matter jurisdiction." 28 U.S.C. § 1447(c). Ordinarily the Court would not have subject matter jurisdiction over Plaintiff's Complaint since "[t]he presence or absence of federal-question jurisdiction is governed by the 'well-pleaded' complaint rule, which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." Caterpillar, Inc. v. Williams, 482 U.S. 386, 392 (1987). "[A] case may *not*

be removed to federal court on the basis of a federal defense, including the defense of pre-emption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties concede that the federal defense is the only question truly at issue." Id. at 393 (citing Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 12 (1983)) (emphasis in original). However, a federal statute may so completely preempt state law that it occupies the entire field, prohibiting the Plaintiff from alleging any state law claims and permitting removal to federal court. See id. See also Abada v. Charles Schwab & Co., Inc., 300 F.3d at 1118-1119; Paige v. Henry J. Kaiser Co., 826 F.2d 857, 860-61 (9th Cir. 1987). Therefore, the Court will have subject matter jurisdiction over Plaintiff's complaint only if the SLUSA completely preempts Plaintiff's state law claims.

"Under SLUSA, federal court is the exclusive venue for fraud claims "in connection with the purchase or sale of a covered security" and the statute itself specifically provides for removal of such claims to a federal court." Falkowski v. Imation Corp., 309 F.3d 1123, 1128 (9th Cir. 2002). Therefore, Plaintiff's claims will be preempted if: (1) the underlying action is a "covered class action"; (2) the claims are based on state law; (3) the claims concern a "covered security"; and (4) the plaintiff alleges "a misrepresentation or omission of material fact," or "a manipulative or deceptive device or contrivance, in connection with the purchase or sale of a covered security." 15 U.S.C. §§77p(b), 78bb(f)(1).

i. Plaintiff's Action Is A Covered Class Action.

> The term 'covered class action' means . . . one or more named parties seek to recover damages on a representative basis on behalf of themselves and other unnamed parties similarly situated, and questions of law or fact common to those persons or members of the prospective class predominate over any questions affecting only individual persons or members

15 U.S.C. §77p(f)(2)(A).

Plaintiff's Complaint alleges that "Plaintiff . . . brings this action on his own behalf and on behalf of all other persons similarly situated . . . [, that] [t]here is a well defined community of interest in the questions of law and fact involved in this action and affecting the parties [, and that] [t]hese common questions of law or fact predominate over any questions that may affect only individual Class members." ¶¶10, 12.

Plaintiff's action falls within the definition of a "covered class action".

ii. Plaintiff's Claims Are Based On State Law.

As set forth above, each of the causes of action alleged in Plaintiff's Complaint are based on state law.

i. Plaintiff's Claims Concern "Misrepresentations and Omission of Material Fact" Made "In Connection with The Purchase Or Sale of A Covered Security."

> The term 'covered security' means a security that satisfies the standards for a covered security specified in paragraph (1) or (2) section 77r(b) of this title at the time during which it is alleged that the misrepresentation, omission, or manipulative or deceptive conduct occurred . . .

15 U.S.C. §77p(f)(3).

For purposes of this section, the following are covered securities:

> (1) Exclusive Federal registration of nationally traded securities
>
> A security is a covered security if such security is –

> (A) listed, or authorized for listing, on the New York Stock Exchange or the American Stock Exchange, or listed, or authorized for listing, on the National Market System of the Nasdaq Stock Market . . .

Although Defendant's Research Products are not "covered securities" themselves, they do however, rate and list stocks that fall squarely within the definition of "covered securities". Therefore, the Court must consider whether the misrepresentations and omissions in Defendant's Research Production can be characterized as having been made "in connection with the purchase or sale" of stock.

Because the SLUSA does not define "in connection with" and few courts have interpreted this language, the Courts rely on cases interpreting the "in connection with" language contained in Section 10(b) (15 U.S.C. §78]). See Falkowski v. Imation Corp., 309 F.3d at 1129; Green v. Ameritrade, Inc., 279 F.3d 590, 597 (8th Cir. 2002). The United States Supreme Court has cautioned that the "in connection with" language in section 10(b) "should be construed, 'not technically and restrictively, but flexibly'" in order to include both typical and novel forms of fraud. Affiliated Ute Citizens of Utah v. United States, 406 U.S. 128, 151 (1972) (quoting SEC v. Capital Gains Research Bureau, Inc.,

375 U.S. 180, 195 (1963).) The "in connection with" requirement is satisfied, if the buyer or seller of a security suffers an injury as a result of "deceptive practices touching" on the purchase or sale of securities. Superintendent of Ins. of N.Y. v. Bankers Life & Casualty Co., 404 U.S. 6, 12-13 (1971). "It is enough that the scheme to defraud and the sale of securities coincide." SEC v. Zandford, 535 U.S. 813, (2002); Falkowski v. Imation Corp., 309 F.3d at 1130. See also Ambassador Hotel Co. v. Wei-Chuan Inv., 189 F.3d 1017, 1026 (9th Cir. 1999) (noting "the fraud in question must relate to the nature of the securities, the risks associated with their purchase or sale, or some other factor with similar connection to the securities themselves.")

Plaintiff cannot escape the obvious connection between the alleged misrepresentations in Defendant's Research Products and the purchase or sale of securities. Plaintiff here alleges that Defendant misrepresented the value of stock in order to further the interests of its investment banking business. Plaintiff is careful to avoid alleging that the misrepresentations in Defendant's Research Products impacted Plaintiff's stock buying decisions. However, Plaintiff would only be concerned with the accuracy of Defendant's Research Products if Plaintiff intended to, and did, in fact, rely on them in deciding to purchase or sell stock. Plaintiff's prayer for relief seeking restitution of "fees and commissions" paid to Defendant supports this position because the fees and commission Plaintiff seeks to

recoup were paid to Defendant for its brokerage services, that is, Defendant's purchase and sale of stocks on Plaintiff's behalf. See Falkowski, 309 F.3d at 1131 ("The claim that defendant concealed the impending accounting write-off sufficiently alleges fraud "in connection with" a contract to sell Imation shares because it involves a misrepresentation about the value of the options . . . [this] allegation . . . "coincide[s]" with the securities transaction, and . . . [is] easily characterized as having 'more than some tangential relation to' the securities themselves); Feitelberg v. Merrill Lynch & Co., Inc., 234 F.Supp. 2d 1043, 1052 (N.D. Cal. 2002) ("[P]laintiff's allegations attempt to establish that defendants misrepresented the value of stock in order to further the interests of their investment banking division and that such misrepresentation affected the value of stock. Accordingly, it is clear that the scheme to defraud and the sale of securities coincide. As such, the alleged misfeasance clearly is 'in connection with' the sale of securities.") *Compare* Green v. Ameritrade, Inc., 279 F.3d at 597-99 (holding that a quote service's failure to provide real-time option quotes as it had contracted to do, did not amount to fraud "in connection with" the "sale or purchase of a covered security." Plaintiff, a quote service subscriber had removed all allegations from his Complaint that he bought or sold options in reliance on the quote service and Plaintiff sought to recover the monthly fee he paid to subscribe to the quote service, and not damages for the any sale or purchase made in reliance on the quote service. Accordingly the Court found that Plaintiff's

claim was a pure contract claim and not preempted by the SLUSA.)

Accordingly, Plaintiff's claims meet the four SLUSA requirements. Therefore, the SLUSA preempts Plaintiff's state law claims.

B. MOTION TO DISMISS.

Once the requirements of the SLUSA are met, the statute precludes all state law causes of action. See 15 U.S.C. §77p(b); 15 U.S.C. §78bb(f)(1). Accordingly, Plaintiff's state law claims must be dismissed. Plaintiff's original Complaint and FAC allege state law claims exclusively, and these claims must be dismissed. However, Plaintiff may be able to assert claims under federal securities law, and should be given the opportunity to do so.

C. CONCLUSION.

Plaintiff's Motion to Remand is DENIED.

Defendant's Motion to Dismiss is GRANTED without prejudice. Plaintiff shall file a Second Amended Complaint within twenty days of the date of this Minute Order.

IT IS SO ORDERED.

The Clerk shall serve a copy of this Minute Order on all parties to this action.

(3)

Supreme Court, U.S.
FILED
APR 11 2005
OFFICE OF THE CLERK

No: 04-1209

IN THE

Supreme Court of the United States

MARTIN A. POLITZER,

Petitioner,

v.

SALOMON SMITH BARNEY INC.,

Respondent.

On Petition For Writ of Certiorari
To The United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT SALOMON SMITH BARNEY IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

Respondent respectfully submits that the sole question presented by the instant Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, is as follows:

1. Whether the Court of Appeals properly concluded – consistent with every other Court of Appeals to address the issue – that a putative class action brought under state law, seeking the restitution of brokerage commissions paid in connection with securities transactions, is preempted by the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), Pub. L. No. 105-353, 112 Stat. 3227?

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COUNTERSTATEMENT OF THE CASE

A. The Complaint

Petitioner, on behalf of a putative class of Salomon Smith Barney ("SSB") retail customers, seeks compensatory damages and disgorgement of commissions and other fees paid to SSB in connection with a brokerage account that he maintained at SSB. At its core, the complaint alleges a deceptive scheme to issue materially false and misleading investment recommendations in connection with the purchase and sale of securities.

SSB research analysts issue reports and notes on the securities of publicly-traded companies, which contain recommendations to investors to buy, hold or sell such securities. SSB provides this research to its retail brokerage customers, such as Petitioner. Petitioner alleges that he and the members of the putative class, all of whom are SSB customers, paid commissions and fees in connection with their brokerage accounts with SSB at least in part because they sought to obtain SSB's unbiased research and research-based recommendations.

According to Petitioner, however, SSB's research and analysis were biased during the putative class period. Petitioner claims that in an effort to "direct hundreds of million dollars [sic] in investment banking business to SSB," the firm issued "purposely misleading reports and ratings." (Compl. ¶ 17.) Among the misrepresentations and omissions alleged in the complaint, Petitioner alleges that "[a]s part of the scheme, SSB would issue supremely optimistic stock reports and ratings, which were knowingly false and unrealistic, containing strong recommendations that overstated the potential for share price appreciation while unreasonably minimizing the risks." (*Id.*)

Petitioner brings three causes of action, all under California law. First, Petitioner alleges "misrepresentations and omissions" under the California Consumer Legal Remedies Act. (*Id.* ¶¶ 27-30.) Second, Petitioner brings a claim under

California Business & Professions Code § 17200 *et seq.*, alleging that SSB's research reports were "fraudulent." (*Id.* ¶¶ 31-35.) Third, Petitioner brings a common law claim for constructive fraud, alleging that SSB "faile[d] to disclose material information." (*Id.* ¶¶ 36-40.)

B. Proceedings Below

Petitioner filed the class action complaint in this action in California Superior Court for the County of Los Angeles on January 29, 2003. SSB removed the action to the United States District Court for the Central District of California on February 20, 2003, because the action was a state-law securities fraud class action preempted by SLUSA. On April 18, 2003, Petitioner moved to remand this action to state court; on April 25, 2003, SSB opposed that motion and cross-moved to dismiss the action as preempted by SLUSA.

On April 16, 2002, just two days before his motion to remand was due, and nearly two months after this action was removed to federal court, Petitioner filed a First Amended Complaint that included certain wording changes to the original complaint, and added a cause of action for false advertising. (App. at 8a.) Most relevantly, Petitioner carefully excised all references to the word "commissions," and similarly took pains to scrub the complaint clean of any references to his purchases or sales of securities through SSB that were mentioned in the original complaint. Indeed, the district court (Walter, J.) would describe the First Amended Complaint as "substantially the same as his [original] Complaint," except for the addition of another state cause of action and "the deletion of certain language in an apparent effort to avoid SLUSA preemption." (*Id.*)

The district court took the motions under submission and on June 16, 2003, in an unpublished minute order, granted SSB's motion to dismiss, simultaneously denying Petitioner's motion for remand to state court. Addressing the remand

motion first, the district court noted that, in determining a question of removal jurisdiction, it was obligated to consider the complaint "as of the time the removal petition was filed." (*Id.* at 8a-9a) (emphasis removed). Therefore, the district court ruled that the First Amended Complaint was "irrelevant" in determining whether removal was proper (*id.* at 9a), and did not consider the First Amended Complaint at all in deciding the remand issue.

The district court then concluded that the misrepresentations and omissions described in the complaint were alleged "in connection with the purchase or sale of a covered security" as that term is used in SLUSA, and that the complaint thus must be dismissed as preempted by the statute. (*Id.* at 13a-16a.) For a number of reasons, the district court held, Petitioner "cannot escape the obvious connection between the alleged misrepresentations in [SSB's] Research Products and the purchase or sale of securities." (*Id.* at 14a.) The district court explained that an investor such as Petitioner "would only be concerned with the accuracy of [SSB]'s Research Product if [Petitioner] intended to, and did, in fact, rely on them in deciding to purchase or sell stock." (*Id.*) Similarly, the district court reasoned that the fact that Petitioner seeks to recoup fees and commissions for brokerage services from SSB underscores the connection of his claims to the purchase and sale of securities. (*Id.* at 14a-15a.)

The district court dismissed the action without prejudice, and granted Petitioner leave to replead his claims under the federal securities laws. (*Id.* at 16a.) Petitioner declined to do so, and the parties stipulated to a proposed order dismissing the action with prejudice, which the district court approved on July 28, 2003. Petitioner appealed to the United States Court of Appeals for the Ninth Circuit.

The Ninth Circuit (Fernandez, Silverman and Callahan, C.J.J.), took the appeal on submission pursuant to Federal Rule of Appellate Procedure 34(a)(2), and issued a short unpublished

memorandum disposition affirming the district court. (*Id.* at 1a-3a.) The Ninth Circuit concluded that the district court was correct "in dismissing [Petitioner's] claims as preempted because SLUSA provides for the removal and dismissal of class actions brought pursuant to state law alleging misrepresentations in connection with the purchase or sale of a covered security." (*Id.* at 2a.) The Ninth Circuit rejected Petitioner's contention that he should be permitted to file an amended complaint clarifying his state-law claims; the panel noted that Petitioner failed even to mention this argument until his reply brief on appeal. (*Id.* at 3a.)

Petitioner subsequently filed the instant Petition seeking a writ of certiorari. Notably, the Petition does *not* assert that the courts below erred in refusing to consider Petitioner's amended complaint for SLUSA preemption purposes. Accordingly, the only question before the Court is whether the Ninth Circuit's decision that the original complaint – in which Petitioner sought to recover the brokerage commissions that he paid SSB – is preempted under SLUSA.

REASONS FOR DENYING THE PETITION

Petitioner's request for this Court to grant a writ of certiorari describes a case almost unrecognizable as the action litigated below. Contrary to the suggestion in the Petition, this case does *not* raise the question whether a claim concerning a transaction not involving a purchase or sale of securities is preempted under SLUSA. It is manifestly apparent that Petitioner's claims are inextricably intertwined with purchases and sales of securities. The Courts of Appeal are unanimous in their view that such claims are preempted under SLUSA.

In truth, far from creating a circuit split, this case falls squarely in the heartland of cases that the Courts of Appeal have held are preempted by SLUSA, and thus does not warrant review by this Court. The Ninth Circuit's summary, unpublished affirmance of the district court broke no new

ground, and is nothing more than a routine application of a federal statute that in no way conflicts with any other Circuit's interpretation of SLUSA. In fact, the result of the memorandum disposition below is fully consistent with the many other Circuits to have addressed the question whether claims for brokerage commissions are preempted by SLUSA.

The disposition resolves no significant question of federal law, nor does it create a circuit split; accordingly, we respectfully submit that this Court should decline to grant the petition for a writ of certiorari.

A. The Questions Presented by Petitioner Were Not Decided by the Courts Below

Petitioner has presented two questions for review by this Court. First, "[w]hether the Ninth Circuit's decision that SLUSA extends to state law actions which do not involve the purchase or sale of a publicly traded security," in alleged conflict with two other Circuits, expands federal law impermissibly. (Pet. at i.) Second, "[w]hether construing SLUSA's 'in connection with' jurisdictional prerequisite to include cases that do not involve a purchase or sale of a security improperly forecloses remedies under California law...." (*Id.*) Neither the Ninth Circuit nor the district court below considered these questions, and, indeed, this case does not raise either of them.

Petitioner predicates both of these questions on the contention that his action does not "specifically allege injury or claims arising from the purchase or sale of securities, for himself or for the purported class" (Pet. at 6), but the record proves exactly the opposite. Petitioner's original complaint was replete with references to the payment of commissions to SSB, and in fact sought restitution of those commission payments:

"Plaintiff at all time [sic] relevant hereto was a client of SSB and paid fees and/or commissions to SSB during that time." (Compl. ¶ 4.)

"The Class is comprised of all SSB California clients and clients of California based brokers of SSB who paid SSB and its brokers fees and commissions for retail services at any time on or after November 1997 until the present." (*Id.* ¶ 10.)

"As a direct proximate result of the aforementioned acts, SSB received and continues to receive fees and commissions from plaintiff and members of the Class." (*Id.* ¶ 35)

"As a result of the [sic] SSB's failure to disclose material information within the context of fiduciary relationships, Plaintiff and the Class Members are entitle to recoup all fees and commissions paid to SSB while maintaining accounts with SSB during the class period." (*Id.* ¶ 40.)

"That the Court Order [sic] restitution to restore to plaintiff and members of the Class all fees and commissions acquired by means of any act or practice declared by this court to be unlawful, unfair or fraudulent business practice" (*Id.*, Prayer for Relief ¶ 4.)

As the district court observed, the only possible reason that Petitioner would have paid commissions to SSB would be in connection with purchases of securities. (App. at 14a-15a.) Petitioner's assertion that this action does *not* involve the

purchase or sale of securities is thus belied by his own complaint.[1]

In presenting his questions to this Court, then, Petitioner is presenting questions that have not been decided by the courts below. That is, because the only complaint considered by the courts below in fact sought restitution of brokerage commissions, Petitioner simply errs when he asserts that this Petition involves a case that "do[es] not involve the purchase or sale of a publicly traded security." (Pet. at i.) This Court does not ordinarily, and should not in this case, exercise its discretion to review, on a writ of certiorari, questions not decided below. *See Ellis* v. *Dixon*, 349 U.S. 458, 460 (1955) (stating that questions not raised below are not open for review before the Supreme Court, in dismissing a writ of certiorari as improvidently granted); Robert L. Stern *et al.*, *Supreme Court Practice* 459-60 (8th ed. 2002) ("In a surprisingly large number of cases every year, the petition raises questions that were not decided by the court below because they were not raised, or seriously mischaracterizes the holding of the court. Demonstration of such a defect is ordinarily fatal to the petition.")

---

[1] Even if the district court and Ninth Circuit *had* considered the First Amended Complaint, the same result would obtain. Petitioner complains about SSB's research analyst reports concerning publicly traded securities, which plainly "coincide with" the purchase and sale of securities as this Court has defined that term in the context of Section 10(b) of the Securities Exchange Act of 1934, ch. 404, 48 Stat. 881 (codified as amended at 15 U.S.C. § 78a *et seq.*), in *SEC* v. *Zandford*, 535 U.S. 813, 819-25 (2002), and elsewhere. However, in light of Petitioner's allegations in his complaint, the courts below were not required reach this issue, and this Petition accordingly does not present this question.

B. The Ninth Circuit's Memorandum Disposition Is Consistent With the Decisions of Other Federal Appellate Courts Concerning SLUSA

Every circuit to have considered a putative class action involving claims for trading commissions brought under state law has ruled that such a claim is necessarily alleged "in connection with" the purchase or sale of securities, and thus is preempted by SLUSA. Those courts, like the Ninth Circuit, have all first concluded that the "in connection with" language of SLUSA should be interpreted following this Court's guidance concerning identical language in Section 10(b) of the Securities Exchange Act of 1934. *Falkowski* v. *Imation Corp.*, 309 F.3d 1123, 1129 (9th Cir. 2002); *accord Rowinski* v. *Salomon Smith Barney Inc.*, 398 F.3d 294, 299 (3d Cir. 2005); *Dabit* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 395 F.3d 25, 34 (2d Cir. 2005); *Riley* v. *Merrill Lynch, Pierce, Fenner & Smith*, 292 F.3d 1334, 1342 (11th Cir. 2002); *Green* v. *Ameritrade, Inc.*, 279 F.3d 590, 597 (8th Cir. 2002).

Following this Court's interpretation of the Section 10(b) "in connection with" language, those courts have then uniformly concluded that a prayer for relief seeking restitution of commissions "connect[s] plaintiff's state law action to the purchase or sale of securities, and bring[s] it well within the bounds of SLUSA." *Rowinski*, 398 F.3d at 303. Indeed, in *Rowinski*, which is not cited in the Petition, the Third Circuit affirmed the district court's finding of preemption of a complaint against Respondent Salomon Smith Barney that is virtually indistinguishable from the complaint in this action. In *Rowinski*, as here, plaintiff brought state law claims concerning SSB's research reports, and the Third Circuit – like the courts below – concluded that the claims were preempted because plaintiffs' "prayer for relief encompasses trading fees and commissions—charges incurred only in connection with the purchase or sale of securities." *Id.*

Every other circuit court to reach the issue has reached the same conclusion. *Dabit* 395 F.3d at 48 ("We hold that ... the claims for commissions paid to Merrill Lynch are preempted because they necessarily involve allegations of a purchase or sale of securities 'in connection with' this alleged misconduct."); *Behlen* v. *Merrill Lynch*, 311 F.3d 1087, 1094 (11th Cir. 2002) (holding that removal and dismissal under SLUSA was proper because "the fees and commissions were not incidental to the sale of the securities, but were an integral part of the transactions"). The Ninth Circuit's affirmance of the dismissal of Petitioner's commissions-based claims thus is entirely consistent with the consensus in the quickly maturing body of caselaw under SLUSA. There is simply no circuit split warranting the issuance of a writ of certiorari in this case.

Petitioner strains to assert that the Ninth Circuit's unpublished disposition below somehow conflicts with published opinions of the Second and Eleventh Circuits. Petitioner is wrong on both counts. First, the disposition below is consistent with the Second Circuit's decision in *Dabit* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 395 F.3d 25 (2d Cir. 2005). Indeed, the Second Circuit was quite explicit that where, as here, a plaintiff alleges commissions-based damages, those claims are preempted by SLUSA, because they "necessarily involve allegations of a purchase or sale of securities." *Dabit*, 395 F.3d at 48.

Petitioner also contends that the disposition below conflicts with the Eighth Circuit's decision in *Green* v. *Ameritrade, Inc.*, 279 F.3d 590 (8th Cir. 2002). But that case involved facts not at all comparable to those present here. There the breach alleged was the defendant's failure to provide "real time, last sales information"; plaintiff alleged that the information provided by a data service was outdated. *Id.* at 594-95. The claimed breach thus related not to any purportedly fraudulent misrepresentation, but rather to whether a data service functioned, as a technical matter, as it was supposed to. Moreover, in *Green* there was no indication that plaintiffs had

purchased any securities in reliance on this data,[2] and the service fee plaintiffs sought to recover was a flat monthly fee—not, as here, transaction-based commissions and fees. *Id.* at 593, 597.

Accordingly, Petitioner's attempt to devise a circuit split fails, and review by this Court of the memorandum disposition below is not warranted.

C. The Disposition Below Does Not Raise Any Federalism Concerns

Petitioner is mistaken when he contends that the courts below erred by determining that his claims are preempted because federalism concerns purportedly militate against the preemption of certain claims brought under California common law. (Pet. at 16-19.) Petitioner's contention that the court below erred because its holding that Petitioner's claims are preempted forecloses an avenue of relief under state law misses the point of preemption entirely.[3] As a number of circuits have recognized, SLUSA is a "complete preemption" statute. *E.g.*, *Spielman* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 332 F.3d 116, 123 & n.5 (2d Cir. 2003); *Falkowski*, 309 F.3d at 1127-28. Congress has thus already made the clear policy determination that state-law class actions that allege the

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[2] Setting aside the question whether SLUSA preemption applies where plaintiffs do not plead reliance on the misstatement or omission in question, where, as here, such reliance is evident from the face of the complaint, preemption plainly applies.

[3] Petitioner obliquely contends for the first time in this Court that he seeks "holding" damages and that actions seeking such damages are not preempted under SLUSA. Petitioner may well cite the Seventh Circuit's decision last week in *Kircher* v. *Putnam Funds Trust*, No. 04-1495, 2005 WL 757255 (7th Cir. Apr. 5, 2005), in support of his contention that the circuits are split on this question. However, the question whether SLUSA preempts "holder" claims was neither raised nor decided below, was not fairly presented by the complaint, and is thus not raised by this Petition.

"misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security" are *completely* preempted, no matter what statute or common law doctrine a plaintiff may seek to avail himself of. *Falkowski*, 309 F.3d at 1127-28. The Senate Report on SLUSA addresses this point directly and is therefore worth quoting at length:

> Some critics of establishing a uniform standard of liability have attacked [SLUSA] as being an affront on Federalism and contrary to the recent trend towards reinforcing state rights. Proponents of the legislation have argued that we live in an information age in which we have truly national, if not international, securities markets and that uniform standard are entirely consistent with Congress's preeminent power over the regulation of interstate and foreign commerce. The Committee, while sensitive to both these considerations, found the interest in promoting efficient national markets to be the more convincing and compelling consideration in this context.

S. Rep. No. 105-182 (1998), *available at* 1998 WL 226714, at *4.

And this Court has held time and again that when Congress completely preempts an area of law, it essentially federalizes any state-law causes of action. For instance, just two Terms ago, the Court held that "[w]hen the federal statute completely pre-empts the state-law cause of action, a claim which comes within the scope of that cause of action, even if pleaded in terms of state law, is in reality based on federal law." *Beneficial Nat'l Bank* v. *Anderson*, 539 U.S. 1, 8 (2003).

Petitioner's complaint that he is foreclosed from pursuing claims authorized by the California Supreme Court therefore should be addressed to Congress, which has made a policy decision disfavoring certain state-law remedies, and not

to this Court. And to the extent that Petitioner is not complaining about the policy decision that Congress made, but rather about the lower courts' conclusion that his state common law claims are preempted, that is not a question of federalism but rather a garden variety example of statutory interpretation that, as we show above, does not merit certiorari review. Regardless, Petitioner's federalism concerns are readily dismissed.

D. The Court Should Not Grant Review on a Writ of Certiorari Because the Ninth Circuit's Opinion Was Unpublished and Nonprecedential

The Ninth Circuit designated its opinion in this case as "not appropriate for publication" under Ninth Circuit Rule 36-3. (App. at 1a.) This Rule states that unpublished opinions are "not binding precedent," except in limited circumstances not relevant here. 9th Cir. R. 36-3(a). The unpublished, nonprecedential nature of the Ninth Circuit's opinion in this case thus makes it a poor candidate for review on a writ of certiorari.

Commentators have noted that, while this Court "occasionally" grants certiorari to review unpublished opinions, "it does not ordinarily do so and the fact that an opinion is unpublished is relevant to the Court's consideration of the need for review." Stern *et al.* at 459. This Court should follow its regular practice in declining to grant certiorari review of the Ninth Circuit's opinion in this case for two related reasons. First, in issuing only an unpublished, nonprecedential opinion, the Ninth Circuit has not taken a definitive position on the legal doctrine at issue in this case. A later panel of the Circuit would be entirely within its rights to decide the same issues in a different fashion. Therefore, the Ninth Circuit has not developed the law at issue here sufficiently to make prudent the exercise of this Court's discretionary jurisdiction. Second, the unpublished, nonprecedential nature of the opinion makes Petitioner's asserted split between the Ninth Circuit, on the one

hand, and the Second and Eighth Circuits, on the other, illusory. As the Ninth Circuit has not yet issued a precedential opinion on the specific SLUSA preemption issues in this case, there is no Ninth Circuit law on those issues that is binding on future panels, and there by definition cannot be a circuit split.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: April 11, 2005

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No. 04-1209

IN THE

Supreme Court of the United States

MARTIN A. POLITZER, *Petitioner*,

v.

SALOMON SMITH BARNEY INC., *Respondent*

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

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INTRODUCTION

Petitioner asserted state law consumer protection claims against Respondent Salomon Smith Barney ("SSB"). Rather than viewing the complaint in its entirety, SSB selectively focuses on certain allegations which it construes as transaction-based claims, while ignoring others which, fairly read, give sufficient notice of a range of non-transaction-based claims. These claims and supporting allegations are pertinent to evaluating the "in connection with" requirement of the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), Pub. L. No. 105-353, 112 Stat. 3227. Indeed, the Second Circuit has recognized that "fees" like those sought by Petitioner have no connection with the purchase and sale of securities, and are therefore not preempted. From this misconstruction of Petitioner's allegations, SSB proceeds to extract a number of necessarily flawed conclusions. First, it attempts to curtail consideration of the important federal questions raised in this Petition by asserting that both questions, which deal with the scope of SLUSA, were never raised in the proceedings below, which is not the case, as even a casual review of the record reveals. Next, SSB claims that the clearly conflicting decisions of the Courts of Appeals are in harmony with one another, a position that not even the Courts of Appeals themselves assert. SSB also fails to rebut that the decisions below impair state law remedies, and simply states that no impairment exists, in the face of the California Supreme Court's statement to the contrary. Accordingly, Petitioner respectfully requests that certiorari be granted.

I. The Important Questions Presented By This Petition Were Raised In The Proceedings Below And Are Properly Before This Court

SSB first seeks to foreclose review by asserting that questions raised in this Petition were not raised in prior proceedings and therefore are not open for review by this Court. (Resp. Br., 7) (citing *Ellis v. Dixon*, 349 U.S. 458, 460 (1955); ROBERT L. STERN ET AL., SUPREME COURT PRACTICE 459-60 (8th ed. 2002)). The questions presented in the Petition, however, which concern whether SLUSA preempts state law consumer protection claims, even when no purchases or sales of securities are alleged, were at the core of the proceedings below.

Petitioner asserted before the Court of Appeals that SLUSA's "in connection with" requirement was not satisfied because he did not allege the purchase and sale of securities. (App. Opening Br., 5, 14, 23-24.) Further, Petitioner stated that he "alleged only that [he] did not receive the type of information [he] contracted for, and that [SSB] promised to provide. Politzer's complaint . . . does not allege reliance, or the purchase or sale of a security. Consequently, Politzer's claims are properly brought under state law, and are not subject to SLUSA preemption." (*Id.* at 23.)

Indeed, the complaint is devoid of allegations concerning the purchase and sale of securities. As the district court stated, "Plaintiff here alleges that Defendant misrepresented the value of stock in order to

further the interests of its investment banking business. Plaintiff is careful to avoid alleging that the misrepresentations in Defendant's Research Products impacted Plaintiff's stock buying decisions." (App. 14a.)

SSB's contention that the above issues were not raised below is, therefore, without merit. Looking past this selective reading of the record, SSB's contention is that this Court may not review the conflicting interpretations given to SLUSA's "in connection with" requirement by the Courts of Appeals because the lower courts in this case did not consider that issue. That issue was not only raised, but was the determinative issue below. (App. 13a-14a.) The significance of the "in connection with" requirement is evidenced in SSB's Brief in Opposition. (Resp. Br., 3, 5-6, 8-10.)

SSB's claim that the second question presented, whether extending SLUSA to Petitioner's claims improperly forecloses his state law remedies, was never raised below is equally meritless. In seeking remand and opposing SSB's contention that SLUSA preempts those claims, Petitioner has consistently asserted that a finding of preemption would improperly foreclose his remedies under California law. Indeed, in the Court of Appeals, Petitioner sought reversal of the district court judgment asserting, in part, that preemption of his "state law claims for false advertising and consumer fraud against brokerage firms undermines the state's

sovereignty and police power, and leaves consumers without a remedy when brokerage firms falsely describe their research products as objective and independent, when they are tainted by undisclosed conflicts of interest . . . ." (App. Opening Br., 33.)

Further, SSB's contention that this issue was never raised is further belied by the fact that the Petitioner asserts claims under state consumer protection statutes, (*see, e.g.*, App. 6a), the existence of which was a prerequisite to SSB's removal. 15 U.S.C. § 77bb(f)(1)(A). In challenging the preemptive scope of SLUSA, Petitioner's pursuit of state law claims inherently raises the question of an improper foreclosure of state law remedies. As such, SSB's attempt to manufacture what has been described as "a defect [that] is normally fatal to the petition," ROBERT L. STERN, ET AL., *supra*, pp. 459-50, to eliminate the Court's discretion to grant review is illusory and should be disregarded by this Court in determining whether to grant this Petition.

II. Contrary to SSB's Assertions, The Complaint Does Not Allege Transactions In Connection With The Purchase And Sale of a Security

In attempting to downplay the conflict among the Courts of Appeals concerning SLUSA's "in connection with" requirement, SSB again ignores material allegations of the complaint. SSB argues that Petitioner seeks only commissions, and on that basis seeks to

justify the lower court decisions and suggests that the split among the Circuits does not exist. Petitioner sought, in part, restitution of "fees and commissions" to the putative class, but did not limit these to transaction-based sums. (Compl., 13.) As explained below, this incomplete and misleading interpretation of the complaint conceals the crucial finding by the courts below, the same point on which the Courts of Appeals are split, and which led to the lower courts' dismissals.

III. The Courts of Appeals Are Inconsistent In Their Interpretation Of SLUSA's "In Connection With" Requirement

SSB attempts to downplay the inter-Circuit conflict, in large part by taking advantage of the brevity of the Ninth Circuit opinion. The Court of Appeals, in affirming the findings of the district court and relying on the same precedent, however, demonstrates the state of the law in the Ninth Circuit. The district court construed SLUSA's scope expansively: "The 'in connection with' requirement is satisfied, if the buyer or seller of a security suffers an injury as a result of 'deceptive practices *touching*' on the purchase or sale of securities." (App. 14a) (emphasis added). The Court of Appeals approved and endorsed the district court opinion:

> The district court was also correct in dismissing the appellant's claims as preempted because SLUSA provides for the removal and dismissal of

> class actions brought pursuant to state law alleging misrepresentations in connection with the purchase or sale of a covered security. 15 U.S.C. § 77p(b)-(c); *Falkowski v. Imation Corp.*, 309 F.3d 1123, 1128-29, 1131 (9th Cir. 2002); *Patenaude v. Equitable Life Assurance Soc'y of the U.S.*, 290 F.3d 1020, 1023-24 (9th Cir. 2002); *see also Feitelberg v. Merrill Lynch & Co.*, 353 F.3d 765 (9th Cir. 2003) (adopting the district court's opinion dismissing state-law claims as preempted by SLUSA).

(App. 2a-3a.)

Under prevailing Ninth Circuit law, alleged misrepresentations affecting the value of stock satisfy the "in connection with" requirement, regardless of whether there was a purchase or sale. *Feitelberg*, 353 F.3d at 765 (adopting *Feitelberg v. Merrill Lynch & Co., Inc.*, 234 F. Supp. 2d 1043 (N.D. Cal. 2002)). Specifically, misrepresentations of "the value of stock in order to further the interests of [defendant's] investment banking division" are subject to SLUSA preemption under *Feitelberg*. 353 F.3d at 765; 234 F. Supp. 2d at 1052. SSB omits any discussion of these authorities in its brief, perhaps to bolster its claim that the Ninth Circuit's position is undeveloped. The lack of precedential effect of the opinion in this case does not obliterate the binding precedents of the Ninth Circuit set

forth above. Thus, the fact that the Ninth Circuit's opinion in this case was unpublished is of no import.

The Ninth Circuit's view, however, is contradicted by the Second Circuit's construction of the "in connection with" language of SLUSA. The Second Circuit has held that although transaction-based commissions may "necessarily allege misstatements or omissions in connection with the purchase and sale of securities," the same does not hold true for non-transaction-based fees. *Dabit v. Merrill Lynch, Pierce, Fenner & Smith*, 395 F.3d 25, 49 (2d Cir. 2005). "An annual fee for services is paid whether or not the customer transacts on the account, and the misrepresentations inherent in the alleged nonperformance and statutory violations therefore do not necessarily 'coincide[] with' a securities transaction . . . ." *Id.* at 49-50 (citing *SEC v. Zandford*, 535 U.S. 813, 820 (2002); *Green v. Ameritrade, Inc.*, 279 F.3d 590, 598 (8th Cir. 2002); *Rowinski v. Salomon Smith Barney, Inc.*, No. 3:02CV2014, 2003 WL 22740976, at *3 n.5 (M.D. Pa. Nov. 20, 2003)). Therefore, under *Dabit*, claims seeking damages on non-transaction-based fees are not preempted by SLUSA, mandating remand.

Similarly, the Eighth Circuit has held that a plaintiff asserting state law misrepresentation claims "may even plead such a claim and escape SLUSA preemption, so long as his state-law claim does not require him to prove there was a sale or purchase of a covered security in

reliance on the misrepresentation." *Green v. Ameritrade, Inc.*, 279 F.3d at 599 (citing *Abada v. Charles Schwab & Co.*, 127 F. Supp. 2d 1101, 1103 (S.D. Cal. 2000)).

Finally, the Seventh Circuit has recently added to the growing discord among the Courts of Appeals. That court held that even "non-purchaser-non-seller" class actions fall within the ambit of SLUSA. *Kircher v. Putnam Funds Trust*, -- F.3d --, No. 04-1495, 2005 WL 757255, at *5 (7th Cir. Apr. 5, 2005). The *Kircher* court, in providing immense breadth to SLUSA, stated that "[b]y depicting their classes as containing entirely non-traders, plaintiffs do not take their claims outside § 10(b) and Rule 10b-5; instead they demonstrate only that the claims must be left to public enforcement." *Id.* at *4. SSB does not attempt to harmonize *Kircher,* which reads SLUSA even more expansively than the Ninth Circuit, with any other Court of Appeals decision. Its sole assertion is the claim that Petitioner may not assert "holder" claims. SSB cannot eliminate a clear split among the Circuits by ignoring an opinion, or portions of opinions. As even the *Kircher* court opined:

> Unfortunately, however, the other circuits do not agree among themselves (or with the SEC) what Rule 10b-5 itself means. The phrase "in connection with the purchase or sale" of a security is the sticking point.

Id. at *2.

The important questions presented in this Petition arise from that same "sticking point," over which the Courts of Appeals admit that they have been unable to agree. This very point has led to conflicting outcomes in cases involving SSB's investment research. *Compare Rowinski v. Salomon Smith Barney, Inc.*, 398 F.3d 294, 296, 304, 305 (3d Cir. 2005) (finding inclusion of preempted claims mandated dismissal of entire action) *and Norman v. Salomon Smith Barney, Inc.*, 350 F. Supp. 2d 382, 384, 387-88 (S.D.N.Y. 2004) (refusing to dismiss even though acts underlying state law claims "could also form the factual predicate for a securities fraud action . . . .").

IV. Preemption, Which By Definition Places Limits On State Remedies, Raises Inherent Federalism Concerns

Lastly, SSB urges that the lower court opinions do not implicate federal concerns, even though those opinions foreclose Californians' state law protections, as the California Supreme Court has recognized. *Small v. Fritz Companies, Inc.*, 30 Cal.4th 167, 171 (2003). It improperly invokes the label of "complete preemption," which has been applied to SLUSA, as a self-executing declaration of the scope of that statute. This term, however, is not "a crude measure of the *breadth* of the preemption (in the ordinary sense) of a state law by a federal law . . . ." *Schmeling v. Nordam*, 97 F.3d 1336,

1342 (10th Cir. 1996) (emphasis added). Indeed, the Courts of Appeals continue to struggle with defining SLUSA's boundaries, notwithstanding its "complete" preemptive effect. Equally irrelevant is SSB's characterization of the legal questions presented as "garden variety" interpretation of a statute. SSB's casual treatment of interpretation of the laws – a core function of the neutral and independent judiciary – does not obviate federalism concerns or justify the cavalier abrogation of the states' historic police powers. *See City of Milwaukee v. Illinois*, 451 U.S. 304, 316 (1981).

CONCLUSION

Petitioner therefore respectfully requests that the petition for a writ of certiorari be granted.

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